BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JERRY ZACHARE	)	
Claimant	)	
	)	
VS.	)	
	)	
BUILDERS PLUS	)	
Respondent	)	Docket No. 1,006,699
	)	
AND	)	
	)	
EMPLOYERS MUTUAL CASUALTY CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the March 4, 2003, preliminary hearing Order entered by Administrative Law Judge John D. Clark.

ISSUES

The first preliminary hearing in this case was held on November 26, 2002. The respondent denied the compensability of the claim and further denied timely notice. The Administrative Law Judge (ALJ) determined claimant suffered accidental injury arising out of and in the course of employment and that timely notice was provided. Dr. Gery Hsu was designated the authorized treating physician and respondent was ordered to provide claimant temporary total disability compensation if claimant was taken off work.

There was no request for Board review of that decision. But respondent took additional depositions and scheduled a second preliminary hearing seeking termination of claimant's medical and temporary total disability benefits. Respondent again denied claimant suffered accidental injury arising out of and in the course of employment and denied that claimant provided timely notice. After the second preliminary hearing held on March 4, 2003, the ALJ denied respondent's request to terminate claimant's benefits.

Respondent argues claimant suffered his injuries in a fall from a horse instead of the alleged work-related incident carrying rebar or riding in a small truck. And respondent argues claimant only provided notice that he suffered back pain from riding in a truck but never told his supervisors about any alleged injury from carrying rebar.

Claimant argues the preponderance of the evidence establishes that he did not fall from a horse and suffer any injuries. Instead claimant argues the evidence establishes he suffered accidental injury arising out of and in the course of his employment. Consequently, claimant requests the ALJ's decision denying termination of benefits be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant alleged he suffered injury to his neck and hands from repetitive work activities commencing the latter part of July 2002, and each and every working day until he was laid off on August 30, 2002.

Claimant was employed as a job superintendent for respondent. His job duties included not only managing a job site but also involved performing the concrete work with the laborers.

In late July 2002, claimant was picking up rebar which he lifted over his head and placed on his hard hat to carry. Another employee was assisting claimant and they both carried the rebar in this fashion. This activity continued for a number of days. Claimant continued working and his neck and hand pain worsened.

On August 22, 2002, claimant had a meeting with Hal Callen, respondent's owner, and Larry Bodley, respondent's territory manager, to discuss claimant's salary. Claimant testified that at the meeting he advised them about injuring himself lifting and carrying rebar and that driving a small pickup truck was also bothering his back. He also testified that he had told Mr. Bodley about his neck pain on numerous occasions. Both Mr. Callen and Mr. Bodley denied claimant mentioned any incident lifting or carrying rebar. But both agreed claimant complained about back pain which claimant attributed to driving a small pickup provided by respondent.

Claimant denied he told anyone that on August 14, 2002, that he had fallen from a horse and been injured. Claimant also denied he knew a Maurice Hymon. Claimant's wife and father also testified that claimant had not injured himself in a fall from a horse.

On August 30, 2002, claimant was laid off because of a lack of work. On September 3, 2002, claimant sought medical treatment with Dr. John W. Voth, his

physician. Claimant provided a history of hand numbness for 5 or 6 months and that his work on a construction job, especially driving a truck, had caused jarring to his neck and back. Claimant noted a worsening in the last month of his neck pain as well as the numbness and tingling in his arms and hands.

An MRI of claimant's cervical spine revealed a herniation of nucleus pulposus at C5-6. Dr. Voth referred claimant to Dr. Gery Hsu for a neurosurgical consultation. Dr. Hsu diagnosed a herniated disc at C5-6 and possible bilateral carpal tunnel syndrome. A course of conservative treatment was recommended. After the November 26, 2002, preliminary hearing the ALJ designated Dr. Hsu as the authorized treating physician.

The respondent then obtained the deposition testimony of Morris Hyman, a construction worker and concrete finisher. Mr. Hyman was temporarily laid off from his job working for respondent. Mr. Hyman testified that claimant had supervised his work and signed off on his time card. Mr. Hyman further testified claimant had been late to work sometime in Mid-August 2002 and when Mr. Hyman commented about the tardiness, the claimant explained a horse he was riding had thrown him and his back, neck and shoulders hurt. And Mr. Hyman noted claimant had told him the horse had hurt its neck.

Greg Moon, a former employee of respondent, testified that he had worked with claimant in July and August 2002 and had seen claimant carrying rebar balanced on his hard hat. He noted claimant had voiced complaints in late July about his neck and back pain when he picked up things.

Workers have the burden of proof to establish their rights to compensation and to prove the various conditions upon which those rights depend.[1] "Burden of proof" means the burden to persuade by a preponderance of the credible evidence that a party's position on an issue is more probably true than not when considering the whole record.[2]

For an injury to be compensable, a claimant must prove that the injury was caused by an accident which arose out of and occurred in the course of employment.[3] An injury is also compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[4] In such cases, the test is not whether the

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[1] K.S.A. 44-501(a).

[2] K.S.A. 44-508(g).

[3] K.S.A. 44-501(a).

[4] *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971); *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. ___ (2001).

accident caused the condition, but whether the accident aggravated or accelerated a preexisting condition.[5]

The testimony is conflicting on the issue whether the claimant gave timely notice of his accident. The claimant alleges that he not only advised both Mr. Callen and Mr. Bodley about neck pain from lifting the rebar but also that driving the small pickup was jarring and causing back and neck pain. Both Mr. Callen and Mr. Bodley agree claimant complained of back pain from driving the small pick up truck, but they deny any mention of the incident lifting rebar or that claimant complained of neck pain.

The testimony is also conflicting on the issue whether claimant suffered injury in an alleged fall from a horse rather than any work-related incidents. Mr. Hyman testified claimant told him about a mid-August 2002 fall from a horse injuring his neck, shoulder and back. Claimant denied the conversation as well as the fall. Claimant's wife and father deny claimant was injured falling or being thrown from a horse. Mr. Moon testified claimant was complaining of neck pain before the alleged horse incident and further that he had never heard about claimant being injured in a fall from a horse.

The Workers Compensation Act requires workers to give notice of their accidental injury within 10 days of when it occurs. But that 10-day period may be extended to 75 days if the worker has just cause for failing to notify the employer within the initial 10-day period following the accident. Further, the employer's actual knowledge of the accident renders the giving of such notice unnecessary.[6]

The Board finds the preliminary hearing record contains testimony from Mr. Callen and Mr. Bodley that directly conflicts with claimant's testimony. The Board finds the ALJ, in finding claimant suffered injury each and every working day through August 22, 2002, and specifically finding that notice was provided respondent had to conclude that claimant's testimony was truthful. The ALJ had the opportunity to evaluate all of the witnesses credibility because they all, with the exception of Mr. Hyman, testified in person at the two preliminary hearings. In circumstances such as this, where conflicting evidence provides more than one possible answer, the Board finds it is appropriate to give some deference to the ALJ's conclusions. Therefore, at this point in the proceedings and giving some deference to the ALJ's conclusions, the Board finds claimant suffered accidental injury arising out of and in the course of employment and that he provided respondent with timely notice of the accident.

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[5] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 949 P.2d 1149 (1997).

[6] See K.S.A. 44-520.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.[7]

AWARD

WHEREFORE, the Board that the Order of Administrative Law Judge John D. Clark dated March 4, 2003, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of April 2003.

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BOARD MEMBER

c: Kevin T. Stamper, Attorney for Claimant
James M. McVay, Attorney for Respondent
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation

[7] K.S.A. 44-534a(a)(2).